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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 29

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, *et al.*,
Appellants,

vs.

J. MILLARD TAWES, GOVERNOR OF THE STATE OF MARYLAND, *et al.*

On Appeal from the Maryland Court of Appeals

BRIEF AND APPENDIX FOR ATTORNEYS GENERAL OF THE STATES AS *AMICI CURIAE*

ARTHUR J. SILLS,
Attorney General of New Jersey,
Trenton, New Jersey.

ROBERT W. PICKRELL,
Attorney General of Arizona,
Phoenix, Arizona.

DUKE W. DUNBAR,
Attorney General of Colorado,
Denver, Colorado.

BERT T. KOBAYASHI,
Attorney General of Hawaii,
Honolulu, Hawaii.

ALLAN G. SHEPARD,
Attorney General of Idaho,
Boise, Idaho.

EDWIN K. STEERS,
Attorney General of Indiana,
Indianapolis, Indiana.

Of Counsel and on the Brief:

THEODORE I. BOTTER,
First Assistant Attorney General
of New Jersey,

HOWARD H. KESTIN,
CHARLES J. CASALE, JR.,
Law Assistants of New Jersey.

Dated: October 9, 1963.

(Additional list of Attorneys General appears on reverse side of this cover)

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WILLIAM M. FERGUSON,
Attorney General of Kansas,
Topeka, Kansas.

JACK P. F. GREMILLION,
Attorney General of Louisiana,
Baton Rouge, Louisiana.

T. WADE BRUTON,
Attorney General of North Carolina,
Raleigh, North Carolina.

HELGI JOHANNESON,
Attorney General of North Dakota,
Bismarck, North Dakota.

WALTER E. ALESSANDRONI,
Attorney General of Pennsylvania,
Harrisburg, Pennsylvania.

J. JOSEPH NUGENT,
Attorney General of Rhode Island,
Providence, Rhode Island.

FRANK L. FARRAR,
Attorney General of South Dakota,
Pierre, South Dakota.

CHARLES GIBSON,
Attorney General of Vermont,
Montpelier, Vermont.

Amici Curiae.

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IN THE

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OCTOBER TERM, 1963

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Appellants,

vs.

J. MILLARD TAWES, GOVERNOR OF THE STATE OF MARYLAND, *et al.*

On Appeal from the Maryland Court of Appeals

BRIEF FOR ATTORNEYS GENERAL OF THE STATES AS *AMICI CURIAE*

Opinions Below

The opinion of the Maryland Court of Appeals (R. 162) is reported in 229 Md. 406, 184 A. 2d 715 (1962). An earlier opinion of the Maryland Court of Appeals, issued on April 25, 1962, is reported in 228 Md. 412, 180 A. 2d 656. Opinions of the Ciruit Court for Anne Arundel County are not reported officially but are unofficially reported in *The Daily Record* (Baltimore), May 28, 1962, p. 1 (R. 100) and July 2, 1962, p. 3 (R. 113).

Jurisdiction

The judgment of the Court of Appeals for Maryland was entered initially on July 23, 1962, in the form of a *per curiam* order, with three of seven judges dissenting (R. 124; 229 Md. 317, 182 A. 2d 877). A timely motion for reargument was denied, without opinion, on September 11, 1962 (R. 125). The majority and dissenting opinions of the Court of Appeals for Maryland were issued on September 25, 1962 (R. 162). A notice of appeal was filed on September 28, 1962 (R. 193), and the appeal was docketed on October 24, 1962. This Court noted probable jurisdiction on June 10, 1963, 374 U. S. 804.

Appellants assert (Ab2)[1] that jurisdiction of the Court rests on 28 U. S. C. 1257(2) and 28 U. S. C. 2101(e); the Solicitor General of the United States, Archibald Cox[2] asserts (Cb1) that it rests upon 28 U. S. C. 1253.

Questions Presented

1. Whether Maryland's form of representative government, insofar as its Senate has one Senator for each county and each of six legislative districts of Baltimore City—its House of Delegates being apportioned to some extent on a population basis among the 23 counties and six legislative districts—is a rational and republican form of government guaranteed by Article IV, Section IV of the United States Constitution.

2. Whether on appeal to this Court an attack can be made on the apportionment of the Maryland House of Delegates where the appeal below did not question that apportionment.

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[1] Appellants' brief on this appeal is referred to herein as "Ab".

[2] The Solicitor General of the United States, Archibald Cox, is referred to herein as the Solicitor General or as Mr. Cox, and his brief on this appeal as "Cb".

Constitutional Provisions and Statute Involved

Sections 1, 2 and 5 of Article III of the Maryland Constitution (C App A91)[3] and Chap. 1, Acts of the 1962 Special Session of the Maryland General Assembly, Article 40, Sec. 42, Maryland Code (1962 Supp.), reproduced in A App A77[4].

Fourteenth Amendment to the Constitution of the United States (Equal Protection Clause) and Article IV, Section IV (Guaranty Clause).

Interest of the Attorneys General of the States

The attorneys general of the States appearing herein as *amici curiae* respectfully seek to aid in the Court's determination of the grave constitutional questions presented by this case. This case concerns the right of States, by and on behalf of their peoples, to select their own republican forms of State government and to seek protection from this Court, under the Guaranty Clause, for such forms of government.

This case, and other cases now before this Court, *Reynolds* v. *Sims*, Nos. 23, 27, 41; *Davis* v. *Mann*, No. 69 and *WMCA, Inc.* v. *Simon*, No. 20, will establish important segments of substantive law in a field newly opened by *Baker* v. *Carr*, 369 U. S. 186 (1962). In broad outline this case concerns the constitutionality of a State legislative system consisting of a bicameral legislature which has one house composed of one member from each of various counties and legislative districts, regardless of population, and a second house composed of members allocated to some extent on a population basis among subdivisions of the State.

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[3] Mr. Cox's Appendix is designated herein as "C App".

[4] Appellant's Appendix A is designated herein as "A App. A".

Between 1776 and 1790, eleven States had bicameral legislatures (the Pennsylvania and Georgia systems were unicameral). Of the eleven, seven based representation on political subdivisions. The county was used exclusively in New Jersey and Delaware; in Maryland, North Carolina and Virginia, counties and certain cities formed the basis for representation. Connecticut and Rhode Island used the town as the representation basis.[5] In 1961 at least 9 states provided for equal representation from a county or town as a unit, regardless of population, namely: Arizona, Idaho, Nevada, New Jersey, New Mexico, Montana, South Carolina, Vermont and Maryland (subject to the treatment of Baltimore City noted in this case).[6] In 28 State constitutions, at least one representative in one or both houses of the legislature is guaranteed to each political subdivision used as a basis for representation.[7]

This case challenges the composition of the Maryland Senate as it includes one member for each of Maryland's 23 counties and the 6 legislative districts of Baltimore City, regardless of the number of inhabitants in these political subdivisions. Md. Const., Art III, Sec. 2. The apportionment of members in the House of Delegates, based upon population, except that each county is given at least two seats, was conceded by appellants in the court below to be a proper apportionment (Cb14, nt. 6; Cb15).

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[5] Del. Const., 1776, Art. 3, 4; N. J. Const., 1776, Art. III; Md. Const., 1776; No. Car. Const., 1776, Art. II; Va. Const., 1776, Chap. II, §§V and VI; see also Connecticut's Colonial Charter of 1662 under which Connecticut was governed, Laws of Conn., 1786 and Rhode Island's Colonial Charter of 1663; *Apportionment of State Legislatures*, Report of the Advisory Commission on Intergovernmental Relations, December 1962, pp. 6-8.

[6] Cb 46; see *Apportionment of State Legislatures, supra*, Appendix A.

[7] *Ibid.*

Litigation is widespread concerning the constitutionality of various State systems of representative government. The rights of many citizens are at stake—the rights of the "minority" as well as those of the "majority". The decision in this case will be watched throughout the nation.

The objectives of our participation in this case are as follows:

1. Respectfully we seek to assist the Court in a proper interpretation of the Fourteenth Amendment and the Guaranty Clause of the Constitution as applied to the issues at hand.

2. We support the basic principle that it is not a violation of the Federal Constitution to adopt or continue a State legislature in which representation in one house is distributed among subdivisions of the State without regard to population, the other house being apportioned on a population standard.

3. We seek to give proper meaning to the "Federal analogy". We demonstrate below in detail that, in modelling the Federal Constitution, delegates to the Constitutional Convention of 1787 freely and frequently employed what may have been termed the "State analogy", comparing (a) counties or other subdivisions in relation to State governments with (b) States in relation to the proposed Federal government.

4. We seek to assist this Court in the formulation of rules or principles governing the *Maryland* case by calling the Court's attention to systems of government in other States, so that the avenue that may be opened can be held in view.

5. In general, we support the principles on which the Maryland system is based; however, we seek to have emphasized the strict limits of any rule announced by this

Court. To the extent that the *Maryland* case is distinguishable on its facts from the cases which follow we hope to preserve without prejudice the position of any other State whose legislative structure may be similar in principle but distinguishable in fact.

In this connection we note that the Solicitor General assumes "*arguendo*, without prejudice to future cases, that there may be objectives of legislative apportionment that would justify inequalities" in *per capita* voting power. But Mr. Cox asserts that this issue need not be decided in the *Maryland* case or the companion cases from Alabama, Virginia and New York (Cb17). Mr. Cox concedes: "If one house of a legislature is apportioned substantially in accordance with population, the Fourteenth Amendment may leave *wider room* for a variation in the other" (Cb21; emphasis added). Mr. Cox contends, however, that the issue is not before the Court because Maryland presents a case of unjustifiable discrimination in *both* houses of its legislature (Cb21; Cb90); therefore, he suggests that the permissible limits of departure from *per capita* equality in representation *in one house alone* need not be determined in this case. Appellants also assert in this Court that, "Unlike the (United States) House of Representatives, the Maryland House of Delegates has *never* been based on population." (Ab21). See also Ab59-60, presenting what appears to be an attack on *both* houses. But on the appeal below the apportionment of the House of Delegates was not questioned by appellants (R. 164).

Since new law is in the making it is extremely important to chart the area carefully.[8] Lower courts are rendering

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[8] See, for example Rigler, *Senate Reapportionment — The Maryland Experience*, 31 Geo. Wash. L. Rev. 812, 820 (1963) where it is said:

> "The question pending before the Supreme Court is whether a resonable relationship is required in senate apportionment."

(*Continued on following page*)

decisions in reapportionment cases based upon constitutional principles not yet announced by this Court. The consequences of those decisions are sometimes irrevocable. Therefore it is desirable to present our views to this Court even before cases in which we may be participating reach this Court.

6. We also contend that the mode of representation in State legislatures is primarily a decision for those who choose to be governed, not for the courts. Solicitor General Cox has expressed the same view in his brief,[9] but he would apply the rule differently. Mr. Cox finds that if one house is apportioned substantially in accordance with population, the Fourteenth Amendment may leave "wider room" for variation in the other house (Cb21). At Cb38 Mr. Cox finds room for State action "within limits"; at Cb46-47 he finds "considerable room"; but at Cb89 he finds only "room for argument" about this proposition.

The limits of State discretion suggested by the Solicitor General would greatly restrict choice. Mr. Cox's limits express a political philosophy to be imposed upon the States that cannot be found anywhere in the vast recordings of

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(Continued from preceding page)

The "basic issue" is described in general terms:

> "If one house is apportioned according to population, must population still be considered in apportioning the other unit of a bicameral legislature?"

[9] Mr. Cox states in his brief, at p. 45:

> "The court is not to exercise the legislative function of choosing between alternatives; still greater deference may be due the people of a State when exercising the sovereign function of shaping their own governmental institutions. The postulates of federalism also argue that in this area the national judiciary must take care to allow full scope for local self-government."

our founding fathers at the Constitutional Convention and elsewhere. We urge that in choosing a republican form of self-government, more than "a little room" was reserved or guaranteed to the States by the Federal Constitution.

Statement of the Case

This is an appeal from a judgment of the Court of Appeals of Maryland which upheld the constitutionality of the mode of representation in the Maryland State Senate.

Plaintiffs-appellants brought this action on August 12, 1960, challenging the mode of representation in the Maryland Legislature. Plaintiffs are an unincorporated association and six residents and voters of certain urban counties of Maryland and the City of Baltimore. Defendants are State officials who are required to perform various duties in connection with State elections.

Plaintiffs claimed that they were under-represented in the Legislature, in violation of their Fourteenth Amendment equal protection rights. They sought a judgment requiring that elections be held at large, or restraining elections until there is submitted for referendum vote an amendment to the Constitution which would reapportion the membership in the Legislature in conformity with the alleged requirements of the Fourteenth Amendment.

The complaint was originally dismissed by Circuit Judge Duckett, but the Maryland Court of Appeals reversed and remanded for a hearing on the merits. *Maryland Committee for Fair Representation v. Tawes*, 228 Md. 412, 180 A. 2d 656 (1962).

The Maryland Constitution of 1867, as amended, provides for a bicameral legislature called the General Assembly of Maryland, composed of a Senate and a House of Delegates. Article III, Sec. 1. The Constitution provides for the divi-

sion of the City of Baltimore into 6 legislative districts according to population. It provides for representation in the Senate by allowing one senator to each of the State's 23 counties, and one to each of the 6 legislative districts. Article III, Sections 2 and 4. There are 8 counties which have 1/20 of the number of inhabitants of Baltimore County, 1/15 of the number in Prince George's County and 1/14 of the number in Montgomery County. A majority of the Senate may be represented by one-seventh of the entire population of the State (R. 97; Cb8, 9, 20-21).

Article III, Section 5 provides for 123 members in the House of Delegates apportioned as follows: 2 each to 7 counties, 3 each to 5 counties, 4 each to 4 counties, 6 each to 7 counties and 6 each to the six legislative districts of the City of Baltimore. This section was adopted by a constitutional amendment in 1950 which fixed the representation in the House of Delegates on the basis of the federal census of 1940 (R. 32-33; Cb7, fn. 2).

After the remand, Circuit Judge DUCKETT ruled that the apportionment of the House of Delegates invidiously discriminated against Montgomery, Baltimore and Prince George's Counties, but not against the people of Baltimore City or Anne Arundel County (R. 108). He declared unconstitutional Article III, Section 5 of the Maryland Constitution. He also held that the General Assembly had power to enact a statute providing for the reapportionment of the House of Delegates.

One week later, on May 31, 1962, the Maryland Legislature enacted temporary legislation reapportioning the House of Delegates. Article 40, Maryland Code (1962 Supp.) Section 42. The new law adds 19 members to the House of Delegates, bringing the total to 142. Seven members were added to the County of Baltimore, making a total of 13, 4 to Prince George's County, for a total of 10,

4 to Montgomery County, for a total of 10, one to Anne Arundel County, for a total of 7, 2 to the third district of Baltimore City for a total of 8 and one to the fifth district of Baltimore City, for a total of 7.

On June 28, 1962, in a supplementary decision, Judge DUCKETT held that the composition of the Senate did not violate the Fourteenth Amendment, although based on political subdivisions, area and geographical location, without regard to population. Again we note that plaintiffs had conceded that the reapportionment of the House of Delegates was proper (R. 114; see Cb14, nt. 6 and Cb15).[10]

On appeal, the Court of Appeals of Maryland noted that:

> "No question is presented as to the validity of the 'stop-gap' legislation or the reapportionment of the House of Delegates." 229 Md. at 410, 184 A. 2d at 716.

The Court of Appeals affirmed, by a vote of 4 to 3 the decision of the lower court. 229 Md. 406, 184 A. 2d 715 (1962). From the determination of the highest court of the State of Maryland appellants have appealed to this Court.

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[10] The court below said that the appeal did not question the apportionment of the House of Delegates (R. 164). Rigler, *Senate Reapportionment — The Maryland Experience*, 31 Geo. Wash. L. Rev. 812, 813 (1963), states that the "stop-gap" legislation enacted by the Maryland Legislature, reapportioning the House of Delegates so as to add 19 seats to the suburban counties represented by the Maryland Committee for Fair Representation and to Baltimore City "was acceptable to the Maryland Committee with regard to the House of Delegates * * *. Accordingly, additional arguments were made in the lower court on the sole issue of senate reapportionment."

Summary of Argument

A. Introduction.

In *Baker* v. *Carr*, 369 U. S. 186 (1962) this Court held that a complaint would be entertained where it was alleged that the apportionment of the legislative houses in Tennessee, based upon a 1901 statute, "constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's Constitution or of any standard, effecting a gross disproportion of representation to voting population." *Id.* at p. 207. This Court there held that the Equal Protection Clause can be invoked to determine, "if on the particular facts * * * a discrimination reflects *no* policy, but simply arbitrary and capricious action." *Id.* at p. 226. The Court suggested that exact equality was not required and that "there is room for weighting." *Id.* at 244-245.

In *Gray* v. *Sanders*, 372 U. S. 368 (1963), this Court declared unconstitutional Georgia's county unit system for counting votes in a primary for the nomination of statewide officers. The Court held that: "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote * * *." The Court expressly said that the case did not present the question of whether a State may have one house in its bicameral legislature chosen without regard to population. The case at hand presents such a question.

B. The Constitutional Convention of 1787 and the "Federal Analogy".

It is said that the Federal system of legislative representation is written into the Constitution and therefore must be valid, but that it cannot be used to justify or prove the rationality of the same system when used by a State. The

principal arguments for rejecting the use of the "Federal analogy" are (a) States in the Federal system are sovereign but counties or other political subdivisions of a state are not sovereign with respect to the State government; and (b) the Federal system was a mere compromise to effectuate a union of sovereign States and is not inherently rational when employed by a State that does not have to compromise with its politically inferior subdivisions.

These distinctions apparently did not impress our founding fathers at the Constitutional Convention of 1787, for they frequently argued by analogy to State forms of government in exactly the same terms as States now refer to the Federal system for proof that it is rational to have one legislative house apportioned according to population and the other according to subdivisions of the larger government, without regard to population. See comments, *infra*, attributed to James Madison ("the counties of Virginia are exceedingly disproportionate, and yet the smaller has an equal vote with the greater, and no inconvenience arises"); Gunning Bedford, Jr. of Delaware ("An exact proportion in the representation is not preserved in any one of the States"); Elbridge Gerry of Massachusetts (in "some States there are two Branches in the Legislature, one of which is somewhat aristocratic" which assures "a better chance of refinement in the choice"); and Nathaniel Gorham of Massachusetts (the need to protect minority groups from oppression resulting from the undue influence of large states combining with others "was applicable not only to States, but to Counties or other districts of the same State"). (Citations *infra*).

Sovereignty is not a sufficient ground for rejection of the "Federal analogy". The States surrendered a large part of their sovereignty to the Federal government, but retained sufficient to afford self-government in local affairs. In the States today considerable autonomy is given to local subdivisions. A clear parallel does exist.

In dividing powers between the Federal government and State governments the delegates to the 1787 Convention desired to strike the right balance between an overpowering government on the Federal level (Alexander Hamilton would have had the President and United States Senators serve for life, during good behavior) and very independent States under the Articles of Confederation which gave the central government practically no authority at all. Here, sovereignty was an appropriate term; the concern was with the degree of authority to be retained by the States.

But in considering the mode of representation in the Federal Congress, the prime concern was how to represent fairly the different segments of society, to give effect to the principle of majority rule and yet to protect the minority against the omnipotence of the majority. The fears for the minority and the need for a check upon the major faction were recognized by delegates from the larger states as well as from the smaller. Governor Randolph of Virginia, who introduced the Virginia Plan containing the essential outlines of the new National government, nevertheless warned at the outset: "Our chief danger arises from the democratic parts of our constitution. * * * None of our constitutions have provided sufficient checks against the democracy. The feeble Senate of Virginia is a phantom. Maryland has a powerful senate, but the late distractions in that State, have discovered that it is not powerful enough." James Madison also admitted the need to temper the principle of majority rule to protect the rights of the minority. He urged the election "of one branch at least" by the people directly, but considered it necessary to provide a remedy against majority interests combining against a minority. He felt that the community should be divided into "so great a number of interests and parties" that common interests would not likely be formed or effectively expressed. (Citations *infra*).

The smaller States feared being "swallowed up" by the larger (William Paterson of New Jersey). They feared that ten states would be "at the mercy of Virginia, Massachusetts and Pennsylvania" (Alexander Martin of North Carolina), and that the delegates of Pennsylvania and Virginia were seeking a system in which they would have "an enormous and monstrous influence." (Gunning Bedford, Jr. of Delaware). They insisted upon representation of "the people" in one house and representation "by States" in the other. (Citations *infra*). But this assures ample representation for the majority. The majority elects representatives to one house, elects the president, and the majority in each State elects representatives to the United States Senate.

The analogy between States and the Federal government in the organization of representative government is intellectually inescapable. For example, except that in the Federal Senate there are two Senators for each of 50 States and in the New Jersey Senate there is one Senator for each of 21 counties, New Jersey presents a classic example of the same system. The New Jersey system was adopted in its 1776 Constitution; the Federal plan came later, in 1787. Both have continued to this day, with refinements in the apportionment of representatives in the larger house. The apportionment in the larger house among New Jersey's 21 counties, as in the House of Representatives, is on a population basis, using the identical formula, the Method of Equal Proportions.

C. Representation According to Population combined with Representation of Subdivisions of the Larger Government is a Rational, Republican Form of Government for States as well as the Federal Government.

The genius of this system of representative government has been acclaimed over the ages. Those who have shared these views were John Stuart Mill, John Adams, Alexis

DeTocqueville and Woodrow Wilson. Benjamin Franklin rejected the suggestion at the 1787 Constitutional Convention that the United States be divided into 13 equal parts, with state boundaries erased, pointing out that continuous changes and divisions would be required to maintain equal proportions of inhabitants. The need to continue recognition of pre-existing political subdivisions or systems of territorial or geographic representation has been affirmed in recent times. Durfee, *Apportionment of Representation*, 45 Mich. L. Rev. 1091 (1945) and DeGrazia, *Public and Republic*, p. 84 (1951).

Choosing or designing a system of representative government is a function of political judgment. We respectfully submit that the people of the States should have the right to exercise their own judgment in these matters.

In the case at hand appellants did not question in the Court below the apportionment of the Maryland House of Delegates. That being so it is for the people of Maryland to determine how the subdivisions of the state should be represented in the Senate, without regard to population. As stated in *The Federalist*, No. 43 (Madison, Jan. 23, 1788): "As long therefore as the existing republican forms are continued by the States, they are guaranteed by the Federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to so do, and to claim the federal guaranty for the latter." Article IV, Section IV, United States Constitution, the Guaranty Clause.

According it is respectfully submitted that representation in a State bicameral legislature according to population in one house and according to subdivisions of the State in the other house is a rational, republican form guaranteed by the Federal Constitution and not offensive to the Fourteenth Amendment.

ARGUMENT

POINT I

A State bicameral legislature consisting of one House in which representation is according to population and a second House in which political subdivisions are represented regardless of population, is a rational, republican form of government guaranteed by the United States Constitution.

A. Introduction.

In *Baker* v. *Carr, supra*, this Court held that a justiciable controversy within the jurisdiction of a Federal court is presented by a complaint alleging that the Fourteenth Amendment equal protection rights of plaintiffs were violated by the composition of Tennessee's bicameral General Assembly. The complaint there alleged that the apportionment of Representatives and Senators under a 1901 Tennessee statute was arbitrarily made "without reference * * * to any logical or reasonable formula whatever". *Id.* at p. 192. That such apportionment also violated Tennessee's State Constitution was not deemed legally significant to this Court's exercise of jurisdiction[11].

The General Assembly of Tennessee consisted of a Senate with 33 members and a House of Representatives with 99

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[11] In 369 U. S. at 195, nt. 15, the Court said:

"Since we hold that appellants have—if it develops at trial that the facts support the allegations—a cognizable federal constitutional cause of action resting in no degree on rights guaranteed or putatively guaranteed by the Tennessee Constitution, we do not consider, let alone enforce, rights under a State Constitution which go further than the protections of the Fourteenth Amendment."

members. The Tennessee Constitution required apportionment of members of both houses in accordance with population. The Constitution required a new apportionment in the year 1871 and "within every subsequent term of ten years" thereafter. *Tenn Const.*, Art. II, Sections III, IV, V and VI. However, no apportionment had been made in Tennessee since 1901. The Court held that a justiciable cause of action upon which appellants would be entitled to appropriate relief was stated by appellants' claim, "that the 1901 statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's Constitution or of any standard, effecting a gross disproportion of representation to voting population." *Id.* at p. 207. The Court held that the Equal Protection Clause can be invoked to determine, "if on the particular facts * * * a discrimination reflects *no* policy, but simply arbitrary and capricious action." *Id.* at p. 226.

Mr. Justice DOUGLAS, concurring, said the question is: "may a State weight the vote of one county or one district more heavily than it weights the vote in another?" He answered this question by pointing out that the Equal Protection Clause prohibits only "invidious discrimination" and said:

> "Universal equality is not the test; there is room for weighting." *Id.* at pp. 244-245.

The complaint alleged "invidious discrimination", and Mr. Justice DOUGLAS held that plaintiffs should be given the opportunity to prove it. *Id.* at p. 245.

Mr. Justice CLARK, concurring, repeated the rule of *MacDougall v. Green*, 335 U. S. 281, 284 (1948), in testing whether state policy is rational:

"It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, *in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available* to the former." (Emphasis added.)

In the views of Mr. Justice CLARK, the Court should refrain from intervening "where there is some rational policy behind the State's system". He held that "numerical equality of representation throughout a State" is not constitutionally required. *Id.* at 253, 260. Mr. Justice STEWART, who also concurred, cited the rule of *Mac Dougall* v. *Green*, *supra*, that of *McGowan* v. *Maryland*, 366 U. S. 420, 425 (1961), holding "the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others", and that of *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580, 584, (1935), holding "the burden of establishing the unconstitutionality of a statute rests on him who assails it." *Id.* at pp. 265-266. Mr. Justice STEWART then said:

"Today's decision does not turn its back on these settled precedents." *Id.* at p. 266.

Mr. Justice FRANKFURTER and Mr. Justice HARLAN dissented.

In *Gray* v. *Sanders*, *supra*, the Court held unconstitutional Georgia's county unit system for counting votes in the Democratic primary for the nomination of a United States Senator and other statewide officers. Mr. Justice DOUGLAS delivered the opinion of the Court, Mr. Justice HARLAN dissenting.

Mr. Justice DOUGLAS carefully pointed out that *Gray* v. *Sanders* did not decide the issues which are now before this Court. He said that the case does not present the question, "inherent in the bicameral form of our Federal Government whether a State may have one house chosen without regard to population." *Id.* at p. 376. He said that *Gray* v. *Sanders* was "only a voting case" (*Id.* at p. 378) and held for the Court that:

> "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit." (*Id.* at p. 379)..

The foregoing briefly demonstrates how far this Court has gone and how far it has not yet gone into the thicket of representative government issues.

B. The Constitutional Convention of 1787 and the "Federal Analogy".

In our view the political concept on which the system of representation in the United States Legislature is based may be applied with equal validity to state legislative houses similarly organized.

It has been argued that the "Federal analogy" does not justify legislative systems of the States. By this is meant that the political philosophy or concept on which our Federal Legislature is based may not be invoked by states to justify a diffusion of legislative representation on the basis of population in one house and political or geographical units in the second house. Whether or not rational, the Federal legislative scheme is written right into the Federal Constitution, so it must be accepted. But it has been said that the Federal scheme does not prove that a similar system is rational for States.

The most common arguments against the application of the "Federal analogy" are: (a) that individual States are sovereign with respect to the National Government, but counties or other political units within a state are not sovereign with respect to the State government (Cb80), and (b) that the plan for the National Government was adopted merely as an expedient, a compromse (Cb73), but that States can maintain a system against the Fourteenth Amendment only if it is rational. It must be implicit in this latter argument that the plan, adopted simply as a compromise, is not a rational mode of affording representation to members or units of a society and therefore cannot pass the test of the Fourteenth Amendment when employed by States.

Opponents of the "Federal analogy" are mistaken on a number of grounds. In the first place, analogy does not mean identity, it means similarity.[12] In developing the Federal plan, the delegates to the Constitutional Convention of 1787 often argued on the basis of what might have been termed the "State analogy". They compared counties or towns in relation to state governments with states in relation to the proposed Federal government. In fact, as rational beings, they also made comparisons with foreign governments, both ancient and contemporary, as was appropriate or useful to their purposes.

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[12] "Analogy" is defined as "A relation of likeness, *between* two things or *of* one thing *to* or *with* another, consisting in the resemblance not of the things themselves but of two or more attributes, circumstances, or effects; * * * *Analogy* is very commonly used to denote similarity or essential resemblance; but its specific meaning is a similarity of *relations*, and in this consists the difference between the argument from *example* and that from *analogy*. In the former we argue from the mere similarity of two things in the latter, from the similarity of their *relations*." Webster's New International Dictionary (2nd Ed. 1943).

We have shown above that between 1776 and 1790 eleven states had bicameral legislatures, and of the eleven, seven based representation on political subdivisions. In *Baker* v. *Carr, supra,* Mr. Justice FRANKFURTER accurately traced the condition of representative government in the Colonies. He said, 369 U. S. at 307-308:

> "Nevertheless, the basic English principle of apportioning representatives among the local governmental entities, towns or counties, rather than among units of approximately equal population, had early taken root in the colonies. * * * [I]n most of the colonies delegates were allowed to the local units without respect to numbers. This resulted in grossly unequal electoral units. * * * Madison in the Philadelphia Convention adverted to the 'inequality of the Representation in the Legislatures of particular States, * * *' arguing that it was necessary to confer on Congress the power ultimately to regulate the times, places and manner of selecting Representatives, in order to forestall the over-represented counties' securing themselves a similar over-representation in the national councils. * * * King also spoke of the extreme numerical inequality arising from Connecticut's town-representation system.
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> "Such inequalities survived the constitutional period."

The historical analysis made by Mr. Justice FRANKFURTER is reflected in the debates at the Constitutional Convention of 1787. S1a *et seq.*[13]

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[13] References to pages of our Appendix A, which contains abstracts of views expressed in the Constitutional Convention of 1787, are referred to herein as S1a *etc.* As stated in the Appendix, the source of this material is *The Records of the Federal Convention* (Farrand, ed. 1911).

Early in the Convention, on May 30, 1787, Madison drew an analogy between states participating in a National government and counties in a State government, saying:

> "* * * [T]here was the same reason for (different numbers) of representatives from different States, as from Counties of different extents within particular States." S4a-5a.

See also; S6a. However, with some inconsistency, James Madison is reported by Robert Yates of New York to have said:

> "In the United Netherlands, Holland governs the whole, although she has only one vote. The counties in Virginia are exceedingly disproportionate, and yet the smaller has an equal vote with the greater, and no inconvenience arises." S21a. (Mr. Cox questions the accuracy of this quotation. See C App. B24).

Gunning Bedford, Jr., of Delaware, speaking for the smaller states who sought an equal voice in the Senate, spoke of the "inequality of representation" in the government of Britain and in the representation of boroughs. He said further, "An exact proportion in the Representation is not preserved in any one of the States." S26a.

Elbridge Gerry of Massachusetts, a large state whose delegates generally espoused the principle of proportional representation, nevertheless drew an analogy to "some States (where) there are two Branches in the Legislature, one of which is somewhat aristocratic", which he considered would assure "a better chance of refinement in the choice" of representatives. S10a. Other delegates argued by analogy to the States, for example, Williamson (S13a), Gorham (S19a-20a), and Randolph (S3a).

Logically, using analogies or comparisons with pre-existing forms of government was a natural step in the reasoning toward the form of government to be adopted at the

Convention. In fact, were a State or Federal government to be formed today, it would defy rationality to suggest that the framers should not consider forms of government that are in vogue.

We refer to New Jersey for an example of the classic case. New Jersey's form of representative government in 1776 was similar to the form adopted by the Constitutional Convention. Today it is almost identical to that of the Federal government. New Jersey has a Legislature composed of a Senate, with one Senator from each of 21 counties, and a General Assembly, with Assemblymen apportioned to each of the 21 counties according to the formula known as the Method of Equal Proportions, with each county guaranteed at least one member. N. J. Const. Art. IV, Section I, par. 1, Section II, par. 1 and Section III, par. 1; also, Laws of N. J. 1961, c. 1, providing for apportionment in one chamber by the Method of Equal Proportions, the same as is used for the United States House of Representatives. The only difference between the New Jersey system and the Federal is that in the United States Senate there are two Senators for each of the member states; in New Jersey each county has one State Senator. Both systems have a Chief Executive with similar powers vis-a-vis their units of government. Is it intellectually possible not to draw an analogy between the two governments?

Reverting to earlier times, we note that the 1776 Constitution of New Jersey provided a similar form of government, consisting of a Governor, a Legislative Council (now the Senate) composed of one member from each of the counties and a General Assembly, whose members were apportioned on the basis of three to each county, subject to reapportionment among the counties "on the principles of more equal representation", providing the total did not exceed 39 members. Constitution of N. J. 1776, Articles

I, II and III. The provisions of the 1776 Constitution were modified in the 1844 Constitution of New Jersey, and the provisions of the 1844 Constitution are the same as in the current Constitution of 1947. Thus, since 1776, New Jersey's Constitutions provided substantially. the identical form of representative government as was adopted for the Federal system in 1787.[14] In other words, New Jersey had this system before the Federal government did, and New Jersey has continued the system with some minor refinement to assure representation in one chamber proportioned every 10 years according to population "as nearly as may be."

Now we turn to the "sovereignty argument" used by those who reject the "Federal analogy." We contend that differences in the scope of sovereignty do not destroy the analogy. Sovereign powers not granted to the Federal government were reserved to the lower governments, the States. Tenth Amendment, United States Constitution. On the state level, powers not granted to local subdivisions were reserved to the higher government, the State governmnt. But States within the Federal system are not entirely sovereign and did, in fact, surrender a large part of their

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[14] We note that in 1784 the population of the various counties in New Jersey ranged from 2,231 in the minimum (Cape May County) to 18,363 in the maximum (Hunterdon County). Votes of Assembly, 1780-1786, p. 33, *All Votes and Proceedings of the Ninth General Assembly*. The last of New Jersey's 21 counties was formed before 1860; there have been no additions or deletions of counties since that time. In 1960, the widest disparity in representation in the New Jersey Senate was between Cape May County, with 48,555 inhabitants and Essex County, with 923,545 inhabitants. *New Jersey Legislative Manual*, 1962, p. 265. An attack upon New Jersey's form of government was rejected in *Jackman* v. *Bodine*, 78 N. J. Super. 414 (Ch. Div. 1963), appeal pending before the Supreme Court of New Jersey on its own certification, —— N. J. —— (1963).

sovereignty to the Federal government.[15] Similarly, although local subdivisions of a State are not entirely sovereign units, they have been granted considerable autonomy by the higher government.[16] Thus, in both relationships,

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[15] Supremacy Clause, Art. VI, Clause 2, U. S. Const.; see powers of Congress, Art. I, Section 8, U. S. Const. Activities of the Federal government "are free from regulation by any state." *Mayo* v. *United States*, 319 U. S. 441, 445, rehearing denied, 320 U. S. 810 (1943). Activities of the State governments are free from regulation by their political subdivisions.

[16] The New Jersey Constitution of 1947, Art. IV, Sec. VII, par. 11, provides:

> "The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. *The powers of counties* and such municipal corporations *shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred,* or essential thereto, and not inconsistent with or prohibited by this Constitution or by law." (Emphasis added.)

New Jersey statutes grant broad powers to county governments. See R.S. 40:20-1 and R.S. 40:18-3. The County Board of Chosen Freeholders is the "legislature of the County," controlling its property and financial interests.

Since New Jersey has no income or sales tax, the substantial tax burden is levied against real and personal property. All of these taxes are raised by municipal and county governments entirely for local use; no county shares these taxes with any other county, nor with the State government. N.J.S.A. 54:4-1 *et seq.*, and see *Ridgefield Park* v. *Bergen County Board of Taxation*, 31 N. J. 420 (1960). The New Jersey State government has been given less taxing power by statute than local subdivisions have. The State government depends on various excise and other taxes, such as corporate franchise taxes, motor vehicle licensing fees and other taxes which are often referred to as "vice taxes"—taxes on alcoholic beverages, cigarettes and racing receipts.

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neither unit in government has the exclusive sovereign power. Laws of the Federal government are supreme over State governments and laws of State governments are supreme over their political subdivisions. Thus, in determining a theory of government which will permit local movement with some autonomy within the orbit of a higher government, similarities and analogies rationally can be considered between separate governmental societies. As Roger Sherman of Connecticut said: "The question is not what rights naturally belong to men; but how they may be most equally and effectively guarded in Society." (S21a). And Alexander Hamilton observed: "* * * individuals forming political societies modify their rights differently, with regard to suffrage. Examples of it are found in all the States." (S23a). The extent to which sovereignty of the States was a factor will be considered further below.

Considering the experience under the Articles of Confederation, the delegates quickly rejected the concept of a unicameral National legislature. Governor Randalph's plan, commonly called the Virginia Plan, was introduced at the opening session of the Convention on May 29 (S2a). On

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The Advisory Commission on Intergovernmental Relations in its December, 1962 report, *Apportionment of State Legislatures*, considered the nature of the "Federal analogy" at pages 42 to 44. The usual arguments for and against the analogy are contained therein. The comments conclude with the following statement:

> "It can be argued with some force on the other hand that with the spread of municipal and county home rule, local units of government are becoming residuaries of 'sovereignty' in a fashion somewhat comparable to the Federal-State relationship. For example, there is considerable sentiment in New York and other States for constitutional provisions reserving to local government all powers not delegated to, or assumed by, the State government."

May 31, the Committee of the Whole, to whom the Randolph plan was referred for consideration, accepted by unanimous vote the resolution for a National legislature consisting of two branches (S5a). Although the delegates also showed an early disposition for electing the members of the first branch by the people of the several States (S5a), the delegates strongly disagreed at the outset on proposals for determining the measure of representation in the two branches.

Notwithstanding his introduction of the Virginia Plan, which called for proportional representation in both houses, Governor Randolph at the first business session warned against excesses of democracy. He said (S3a):

> "Our chief danger arises from the democratic parts of our constitution. * * * None of the constitutions have provided sufficient checks against the democracy. The feeble Senate of Virginia is a phantom. Maryland has a more powerful senate, but the late distractions in that State, have discovered that is not powerful enough. The check established in the constitution of New York and Massachusetts is yet a stronger barrier against democracy, but they all seem insufficient."

See also Governor Randolph's similar remarks the following day, May 31, where he spoke of the "follies of democracy" and asked for "some check" against this tendency, suggesting, "that *a good Senate* seemed the most likely answer to the purpose." (S6a; emphasis added).

The fears for minority groups were expressed primarily by delegates from the smaller states, such as Connecticut, Delaware and New Jersey, but were acknowledged from time to time by delegates from the larger states. Two days after Governor Randolph's opening remarks, Elbridge Gerry, of Massachusetts, one of the three larger states,

said: "The evils we experience fall from the excesses of democracy." He added that he was still "republican", but "had been taught by experience the danger of the levilling (sic.) spirit" (S5a). It was at this point that James Madison urged, "the popular election of *one* branch of the national Legislature as essential to every plan of free Government." (S5a; emphasis added).

Later, on June 6, 1787, James Madison admitted the need to temper in some fashion the principle of majority rule so as to protect the rights of the minority. He again repeated the need to elect "one branch at least" by the people directly (S7a). But he conceded that the source of unjust laws has been the common interest of the "major number". He said: "In all cases where a majority are united by a common interest or passion, the rights of the minority are in danger. * * *" (S7a-8a). Madison offered a remedy for a "Republican Government" where the "Majority if united have always an opportunity." (S8a). He said:

> "The only remedy is to enlarge the sphere, and thereby divide the community into so great a number of interests and parties, that in the 1st. place a majority will not be likely at the same moment to have a common interest separate from that of the whole or of the minority; and in the 2d. place, that in case they should have such an interest, they may not be apt to unite in the pursuit of it. It was incumbent on us then to try this remedy, and with that view to frame a republican system on such a scale and in such a form as will controul all the evils which have been experienced." (S8a).

On the fears for the minority and the need for a check on the majority, see also comments of Gunning Bedford, Jr., of Delaware, who accused the delegates of Pennsyl-

vania and Virginia of seeking a system "in which they would have an enormous and monstrous influence" (S11a); David Brearley, of New Jersey, who urged an equal vote for each State to prevent the smaller States from being "destroyed instead of being saved" (S12a); William Patterson, of New Jersey, who feared that his State "would be swallowed up" (S13a); Roger Sherman, of Connecticut, who feared that a few large States would rule the rest (S15a); Alexander Martin, of North Carolina, who opposed placing "10 States at the mercy of Virginia, Massachusetts and Pennsylvania" (S19a); Nathaniel Gorham, of Massachusetts, who agreed that "there was some weight in the objections of the small states" (S19a); and, Oliver Ellsworth of Connecticut who urged that the minority did not wish to rule the majority but that "the power is given to the few to save them from being destroyed by the many;" and who also said that it was not "novel" that "the few should have a check on the many," referring, by analogy, to the House of Lords and the Commons in England (S24a).

The remarks of Nathaniel Gorham of Massachusetts (a large state) are particularly appropriate in demonstrating the need to protect minority groups from oppression by the majority, whether the relationship is in the Federal or a State system. He recognized that large states could combine with others and have "an undue influence". He then said:

> "This remark was applicable not only to States, but to Counties or other districts of the same State" (S19a).

Mr. Gorham suggested a remedy, namely, that representatives of the larger districts "should not be in an exact ratio to their numbers". He said that experience in Massachusetts had shown the wisdom of this provision (S-19a-20a).

A fair reading of all the debates shows that the claims for sovereignty were primarily justification for a defense against majority faction. The smaller States were willing to yield their sovereignty to the larger union and did so by the grant of important powers to the Federal government. These powers included the power of taxation, which James Madison termed "the highest prerogative of supremacy." (S21a). Rufus King of Massachusetts pointed out that the States were not "sovereigns" in the sense contended by some, and that if they had retained "some portion of their sovereignty, they had certainly divested themselves of essential portions of it." (S18a-19a).

In the debates, claims for sovereignty, justice, liberty and other high values did not entirely conceal what was at stake. Mr. Alexander Hamilton observed: "The truth is it is a contest for power, not for liberty." (S23a). When the so-called New Jersey Plan (strengthening the central government under the Articles of Confederation but keeping its form) was proposed, apparently as a counter-measure to the insistence by the larger States on proportional representation in both houses of the Legislature, John Dickinson, of Delaware, said to James Madison: "You see the consequences of pushing things too far." (S17a). See also: *The Federal Convention and the Formation of the Union of the American States.* (Solberg ed. 1958), at xci-xcii, where Professor W. Solberg of Yale University, in his introduction, stated:

> "If the words are those of 'sovereignty' and 'liberty,' the intent may be that of state rights or slave breeding. Yet lofty expressions did not always mask baser motives."[17]

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[17] With some prescience James Madison later argued that the real line of division between the States was not between the small and large States, as such, but between the northern and southern States.

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It is fair to conclude that the form of representative government which was ultimately reached, frequently described as representation "of the people" according to numbers in one house, and representation "of the states" in the other house,[18] was a rational plan designed to meet the acute fears of the minority, to serve as some check upon the majority, and to assure that the voice of the few would be heard in the councils of government. Majority rule was not rejected. The majority would elect not only representatives to the larger house but, also, the majority in each State would elect representatives to the smaller house. The majority would also elect the Chief Executive whose influence, combined with that of one house in the legislature, accords ample representation to majority interests.[19]

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"principally from (the effects of) their having or not having slaves * * * *." (S23a to S24a). These views did not convince the smaller States that they were secure against the possibility that larger States would combine along other lines of interests and overwhelm the smaller States with their voting power.

[18] William Johnson of Connecticut expressed the not uncommon view that the States be considered in two capacities, one in their political capacity and the other as districts of individual citizens, with the two ideas combined so that in one branch of the legislature the *people* would be represented, in the other, the States (S22a). See also comments of Ellsworth of Connecticut (S22a) and William Davie of North Carolina, "We were partly federal, partly national in our Union." (S25a).

[19] To continue the comparison with a State such as New Jersey, we note that the 1947 Constitution of New Jersey greatly strengthened the powers of the Governor, with "a centralization of authority and power in the office of the Governor under reasonable checks and balances, so that the chief executive may be truly responsible to the people for the conduct of the executive branch of the government." Milmed, *Introduction to the New Jersey Constitution of 1947*, N.J.S.A. Const., XIII, XXI. The result is a strong Chief Executive, elected

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C. Representation According to Population combined with Representation of Subdivisions of the Larger Government is a Rational, Republican Form of Government for States as well as the Federal Government.

The delegates agreed to support the plan which came out of the 1787 Convention and did so. Madison vigorously urged adoption of the system of representative government that was designed at the Convention and praised its virtues in protecting minority interests against the uncontrolled passion of the majority. *The Federalist* No. 10 (Madison, Nov. 22, 1787); *The Federalist* No. 62 (Hamilton or Madison, Feb. 7, 1788).

Eminent political thinkers have applauded the concept of a bicameral legislature with one branch serving as a check upon the other. John Adams expressed the same view, that "a people cannot be long free nor even happy whose government is in one assmbly." A single assembly, he argued, would be subject to fits of passion, prejudice and emotion which would result in hasty and unjust legislation. *John Adams Works*, Vol IV, p. 195 (1851).

John Stuart Mill feared that when a majority in a single assembly assumed a permanent character composed of the same persons acting together and always assured of victory, it easily became despotic, "if released from the necessity of considering whether its acts will be concurred in by another constituted authority." John Stuart Mill, *Considerations on Representative Government*, Chap. XIII, p. 98 (1926).

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by the majority of the people, one House apportioned "as nearly as may be according to the number of" inhabitants of the 21 counties, and the Senate composed of one member from each county, elected by the majority within each county. (Const. of N. J., 1947 Art. IV, Sec. III, par. 1).

Another student of the subject admonished:

> "Of all the forms of government that are possible among mankind, I do not know any which is likely to be worse than the government of a single, omnipotent, democratic Chamber. It is at least as susceptible as an individual despot to the temptations that grow out of the possession of an uncontrolled power, and it is likely to act with much less sense of responsibility and much less real deliberation." Lecky, *Democracy and Liberty*, Vol. I, Ch. IV, p. 361 (1896).

In more recent times, Woodrow Wilson expressed the same thoughts. Luce, *Legislative Assemblies*, p. 75 (1924) says the following:

> "A foremost authority of our own time, Woodrow Wilson, thought along the same lines. The Senate, he observed, is valuable in our democracy in proportion as it is undemocratic. 'I think that a philosophical analysis of any successful and beneficent system of self-government will disclose the fact that its only effectual checks consist in a mixture of elements, in a combination of seemingly contradictory political principles; that the British Government is perfect in proportion as it is unmonarchical, and ours safe in proportion as it is undemocratic; that the Senate saves us often from headlong popular tyranny.'" (Citing, Wilson *Congressional Government*, Ch. IV, pp. 226, 227 (1925)).

Many other political theorists have expressed the same view, that the main function of two dissimilarly apportioned houses is to protect the rights of the minority against an oppressive majority. Alexis DeTocqueville asserted that the "greatest dangers of the American Republic proceed from the omnipotence of the majority." DeTocqueville, *Democracy in America*, Vol. I, pp. 268-270. DeTocque-

ville feared that in a pure democracy the tyranny of the majority, if omnipotent, might undermine the rights of minorities.

The same opinion was expressed earlier in *The Federalist*, No. 51 (Madison or Hamilton, Feb. 6, 1788):

> "It is of great importance in a republic not only to guard society against oppression of its rulers, but to guard one part of society against the injustice of the other part."

Lastly, many writers predict practical difficulties in having both houses apportioned according to population. "It is impossible to disregard entirely the pre-existing political subdivisions of the state and to set up the desired number of legislative districts purely on the basis of population." Durfee, *Apportionment of Representation*, 45 Mich. L. Rev. 1091, 1092 (1945). See also remarks of Benjamin Franklin, at the Constitutional Convention of 1787 in response to an early suggestion by representatives of New Jersey, "that a map of the United States be spread out, that all the existing boundaries be erased, and that a new partition of the whole be made into 13 equal parts" (S12a). Benjamin Franklin found it impracticable to disregard borders and begin anew. At the outset it would mean that part of Pennsylvania would be given to New Jersey and part to Delaware and over the years continuous changes and divisions would be required to maintain equal proportions of inhabitants (S15a).

Another authority concludes as follows:

> "However, democratic governments have rested so long on systems of territorial or geographic representation that they perhaps would not long survive a complete change in their anatomy. The territorial system, furthermore, fosters the spirit of the whole as against

its parts, and at the same time it provides a measure of interest (including economic) representation. '*The democratic way is the path of compromise achieved through intelligence,*' and territorial representation best promotes such compromise." DeGrazia, *Public and Republic*, p. 171 (1951). (Emphasis added).

Choosing or designing a system of representative government is, obviously, a function of political judgment. Because the arguments were made by Mr. Justice FRANKFURTER, with whom Mr. Justice HARLAN joined, in *Baker* v. *Carr*, *supra*, and because of the recency of that decision the purpose here is not to contend that the political nature of the issue precludes its consideration by this Court. The purpose is to ask deference for the views of the States in organizing their own governments. The Solicitor General contends (Cb65) that "practice and democratic theory were not nearly so far apart in 1789 as today. But even if they were, what are most relevant are our aspirations, not our failures." We respectfully submit, however, that here the Solicitor General is simply engaging in political-philosophical debate, not a discussion of law. We do not admit failure on the national level, due to the form of representative government in Congress. Nor do we admit failure in State governments, although states have chosen varying modes for their representative organization. We respectfully submit that the people of the States should have the right to exercise their own judgment in these matters.

In the case at hand, appellants had conceded in the court below that the apportionment in the house of Delegates is valid. On that assumption we have no hesitancy in asserting that the representation in Maryland's State Senate is valid also. There, each county has one representative and the City of Baltimore is divided into six districts to permit representation by one Senator per district, thus,

in effect, giving the City of Baltimore six Senators. We would support the system if no special treatment were given to the City of Baltimore, and we support that system as it is. It is for the people of Maryland to determine to what extent, not exactly in proportion to population, representation in the State Senate should be apportioned among the political subdivisions of the State. But Mr. Cox condemns the system because it is not consistent. It allows representation not only on the basis of counties, but also on the basis of another political subdivision; the City of Baltimore, because of that city's large population. (In 1960 the City of Baltimore had approximately 30 per cent of the population of the entire State, 939,024 out of 3,100,689 (R. 97). It was given 6 Senators out of the total of 29. In the House of Delegates it now has 39 out of a total of 142 seats). Mr. Cox contends that, having chosen to equalize the representation of political subdivisions in the Senate to some extent on the basis of population, the Fourteenth Amendment has been violated because the population standard has not been followed faithfully and consistently (Cb54). But we think that the City of Baltimore must mean more than an aggregate of population, and Maryland can give it such weight as a separate political subdivision as that State deems appropriate. It cannot be said that the Constitutional apportionment of the Maryland Senate "reflects *no* policy." *Baker v. Carr, supra.*

The Solicitor General says: "Our entire history teaches the ideals of voter equality and majority rule" (Cb60). If by "majority rule" Mr. Cox means the unfettered dominance of a major fraction, the answer has already been given by our founding fathers and scholars who followed. Nor do we find authority for the Solicitor General's assertion that: "The framers were in agreement that, as to a State government, with full powers directly over the people, both houses must be apportioned on the basis of popu-

lation." (Cb80). The framers were certainly not "in agreement" on this proposition. As we have shown above, even those delegates who championed popular representation in the National Government recognized the desirability of having diverse houses with a strong smaller house serving as a check upon the popularly elected house. See remarks of Randolph and Madison, S3a, 7a-8a.

Discussing the constitutional provisions which guarantees to each State a republican form of government, James Madison said in *The Federalist*, No. 43. (Madison, Jan. 23, 1788):

> "But the authority extends no further than to a *guaranty* of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. *As long therefore as the existing republican forms are continued by the States, they are guaranteed by the Federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to so do, and to claim the federal guaranty for the latter.* The only restriction imposed on them is, that they shall not exchange republican for anti-republican Constitutions; a restriction which it is presumed, will hardly be considered as a grievance." (Emphasis added in second and third sentences.)

The cases dealing with the Guaranty Clause, discussed in *Baker* v. *Carr*, do not offer much hope for having that Clause affirmatively enforced by this Court. But if it may not be used as a sword for affirmative relief it could still serve as a shield, to preserve rights not granted to the States but *guaranteed* to them.

In conclusion, we respectfully urge here that the system of representation we support is a rational, republican form of government for the States as well as the Federal govern-

ment.[20] The fact that the system finally evolved for the National government to some extent as a matter of compromise does not deprive that system of its rational, sensible characteristics. It does not matter if these characteristics were contemporaneously recognized, which was the case, or urged on grounds of political expediency or political philosophy, which was the case, or whether these characteristics were later used to encourage acceptance of the

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[20] The report of the Advisory Commission on Inter-governmental Relations, *Apportionment of State Legislatures*, at p. 42 states:

> "It may well be that a strict 'federal plan' of representation would produce a rational system of representation in the legislatures of some States."

In 1955 the constitutions of at least eleven national governments had legislative bodies patterned after our Federal system, that is, a bicameral legislature with representation in one house on the basis of population and in a second house on the basis of subdivisions of the national state, without regard to population. *Peaslee, Constitutions of Nations*, 2d ed. (1956). See Constitutions of *Argentina* (2 Senators for each province and 2 for the capital, *id.* Vol. I, p. 57); *Australia* (6 Senators for each of the original States, id., Vol. I, p. 80); *Bolivia* (3 Senators for each department, *id*, Vol. I, p. 188); *Brazil* (3 Senators for each of the States and 3 for the federal district, *id*, Vol. I, p. 207); *Republic of Cuba* (9 Senators for each of the 6 provinces, *id*, Vol. I, p. 632); *Dominican Republic* (1 Senator for each province and for the District of Santo Domingo, *id*, Vol. I, p. 753); *Equador* (2 Senators for each province, 1 for the Galapagos Islands, *id*, Vol I, p. 685); *Mexico* (2 Senators for each State and 2 for the Federal District, *id* Vol. II, p. 679—in the Chamber of Deputies each state must have at least 2 deputies and each territory at least one, *id*, Vol. II, p. 659); *Switzerland* (2 Deputies per Canton, *id*, Vol. III, p. 327); *Union of South Africa* (8 Senators for each province and 8 nominated by the Governor-General-in-Council, *id*, Vol. III, p. 443-444); and *Venezuela* (2 Senators for each State and the Federal District, *id*, Vol. III, p. 713). With the possible exception of Switzerland, we believe that none of these national governments was compelled to compromise with its subdivisions in order to form a federal union of sovereign states.

system or later described to explain the rightness or the success of the system in its operation. That a plan is evolved as a means of compromise does not mean that it is arbitrary, that it is without sense or reason. It is not irrational for a wagon driver, when going down hill, to have one hand on the brake as he applies his whip to the horse. An engine and a brake serve seemingly inconsistent purposes, but it is not irrational to put both in an automobile, or in legislative system.

CONCLUSION

It is respectfully submitted that a State bicameral legislature consisting of one house in which representation is according to population and a second house in which subdivisions of the State are accorded representation, without apportionment according to population, is a rational, republican form of government guaranteed by the United States Constitution and not offensive to the Fourteenth Amendment.

Respectfully submitted,

ARTHUR J. SILLS,
Attorney General of New Jersey,

ROBERT W. PICKRELL,
Attorney General of Arizona,

Of Counsel and On the Brief:

THEODORE I. BOTTER,
First Assistant Attorney General
of New Jersey,

HOWARD H. KESTIN,
CHARLES J. CASALE, JR.,
Law Assistants of New Jersey.

[ADDITIONAL LIST OF ATTORNEYS GENERAL APPEARS ON FOLLOWING PAGE]

DUKE W. DUNBAR,
Attorney General of Colorado,

BERT T. KOBAYASHI,
Attorney General of Hawaii,

ALAN G. SHEPARD,
Attorney General of Idaho,

EDWIN K. STEERS,
Attorney General of Indiana,

WILLIAM M. FERGUSON,
Attorney General of Kansas,

JACK P. F. GREMILLION,
Attorney General of Louisiana,

T. WADE BRUTON,
Attorney General of North Carolina

HELGI JOHANNESON,
Attorney General of North Dakota,

WALTER E. ALESSANDRONI,
Attorney General of Pennsylvania,

J. JOSEPH NUGENT,
Attorney General of Rhode Island,

FRANK J. FARRAR,
Attorney General of South Dakota,

CHARLES GIBSON,
Attorney General of Vermont,

Amici Curiae.

APPENDIX A

Principles of Representative Government Expressed in the Federal Constitutional Convention of 1787

This abstract endeavors to present the principal views or contentions of various delegates and factions at the Constitutional Convention of 1787 on the subject of representative government and the development of the provisions of the Federal Constitution dealing with the National Legislature. An effort has been made to present views that are representative of the proceedings and the debates, with little interpretative comment of our own. However the details of all legislative plans which were proposed are not fully set forth.

Included are the views expressed by delegates of the larger and the smaller states in their conflict over the extent to which popular, proportional representation should be reflected in each house of the National Legislature. We may not have afforded equal space to the viewpoints of conflicting groups. Special emphasis has been given to the expression of views by delegates in various camps concerning the need to protect minority rights.

And because of the current controversy over the extent to which the "Federal analogy" is applicable to the composition of state legislatures, we have included some of the many instances in which delegates to the Federal Convention drew analogies between the plan they urged and state plans, the relationship between states and counties, as well as analogies to forms of representative government in other countries.

Except as otherwise noted below, all references are to various pages of Volume I of *The Records of the Federal Convention* (Farrand, ed., 1911), the Notes of Madison, which are the most complete of all the notes taken by delegates at the convention.

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May 14. Delegates began arriving at Philadelphia. On May 25 George Washington was chosen as Chairman, and on May 28 the delegates adopted convention rules. Full delegations from all eleven states did not arrive until June 2nd. Delegates from New Hampshire arrived on July 23, but no delegates from Rhode Island ever attended.

May 29. Governor Randolph of Virginia opened the business of the convention. At p. 24, Notes of McHenry. He spoke of the weaknesses under the Articles of Confederation, describing the existing government as follows:

> a. It produced no security against foreign invasion, Congress having no power to prevent war, to raise money for a military force or to punish infractions of treaties with foreign nations;
>
> b. It had no power to check quarrels between states;
>
> c. It could not levy tariffs;
>
> d. It could not defend itself against encroachments from the states and was not paramount to the state constitutions. At p. 18.

Randolph presented at the very outset of the convention a series of 15 separate resolutions which together formed a proposal for creating an entirely new structure of government. At pp. 19-22. The Randolph resolutions, commonly referred to as the Virginia Plan, were to be championed by delegates from the three larger states, Virginia, Pennsylvania and Massachusetts, as well as from other states, such as South Carolina and Georgia, whose delegates assumed a rapid growth of those states. At p. 491; and at page 500, Notes of Yates. Since his plan was urged by the advocates of popularly elected representatives who sought to insure the rule of the majority, it

is interesting to note that Randolph, at the very beginning recognized the problem of protecting the interests of the minority. He spoke of his hopes for the success of the convention, but, before even introducing his plan, according to the Notes of McHenry, Governor Randolph warned against the excesses of democracy. He said:

> "Our chief danger arises from the democratic parts of our constitutions. It is a maxim which I hold incontrovertible, that the powers of government exercised by the people swallows up the other branches. None of the constitutions have provided sufficient checks against the democracy. The feeble Senate of Virginia is a phantom, Maryland has a more powerful senate, but the late distractions in that State, have discovered that is is not powerful enough. The check established in the constitution of New York and Massachusetts is yet a stronger barrier against democracy, but they all seem insufficient." At pp. 26, 27, Notes of McHenry.

The legislative plan proposed by Governor Randolph consisted of a National Legislature of two branches, "to be proportioned to the Quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases." The "members of the first branch of the National Legislature ought to be elected by the people of the several States ***." The "members of the second branch of the National Legislature ought to be elected by those of the first, out of a proper number of persons nominated by the individual Legislatures *** to hold their offices for a term sufficient to ensure their independency ***." At p. 20.

Randolph further proposed that there be a National Executive to be chosen by the National Legislature, as well as a National Judiciary, also to be chosen by the

National Legislature. He further proposed that, "a Republican Government and the territory of each State, except in the instance of a voluntary junction of Government and territory, ought to be guaranteed by the United States to each State ***." At pp. 20-22.

May 29. The convention resolved itself into a Committee of the Whole House to which the resolutions of Governor Randolph were referred. A plan for the federal government proposed by Charles Pinckney was also referred to the Committee of the Whole. At p. 23. This plan called for a bicameral legislature composed of a Senate and a House of Delegates. Pinckney proposed that the House of Delegates be elected by the State Legislatures, and apportioned according to population, three-fifths of Negroes included. The Pinckney plan proposed that for the forming of the Senate, the United States was to be divided into "four great districts (so apportioned as to give to each its due weight)" with members to be elected by the House of Delegates "either from among themselves or the people at large." The Senate and House of Delegates were to choose the President of the United States "from among themselves or the People at large." Vol. III, pp. 605-606.

May 30. Meeting of the Committee of the Whole. The clause in Randolph's plan dealing with proportional representation in the legislature was discussed. The Delaware delegation, speaking the fears of the smaller states, challenged the authority of the convention to consider Randolph's plan, a radical departure from the Confederation, and threatened to leave. At p. 37.

Arguing in favor of representation in the national government in proportion to the population of the respective states, Madison drew an analogy between states participating in a national government and counties in a state government saying:

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"* * * as the acts of the General Government would take effect without the intervention of the State legislatures, a vote from a small State would have the same efficacy and importance as (a vote) from a large one, and there was the same reason for (different numbers) of representatives from different States, as from Counties of different extents within particular States." At p. 37.

May 31. By unanimous vote, the Committee voted in favor of a national legislature consisting of two branches. At p. 46, nt. 3. The clause in Mr. Randolph's plan calling for election of members of the first branch by the people of the several states passed by a vote of six to two. But the Committee rejected by a vote of 7 to 3 the clause calling for election of members of the second branch by those of the first. (Emphasis added). At p. 46, Journal.

During the debate Mr. Sherman of Connecticut opposed the principle of election by the people, preferring election by the state legislatures. Mr. Gerry of Massachusetts said, "The evils we experience flow from the excess of democracy." He added that he was still "republican", but "had been taught by experience the danger of the levilling (sic.) spirit." At p. 48.

Mr. Madison urged "the popular election of one branch of the national Legislature as essential to every plan of free Government." He also considered, by analogy, the composition of state legislatures in formulating a national system of government. At p. 49.

On the vote approving election of members in the first branch of the national Legislature by the people, Massachusetts, New York, Pennsylvania, Virginia, North Carolina and Georgia voted affirmatively, New Jersey and South Carolina voted against, and Connecticut and Delaware delegations divided. (Emphasis added). At p. 50.

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In discussing the composition of the second branch of the legislature Mr. Randolph did not have an opinion as to the number of its members but said, "it ought to be much smaller than that of the first; so small as to be exempt from the passionate proceedings to which numerous assemblies are liable." Mr. Randolph observed "that the general object was to provide a cure for the evils under which the United States laboured: that in tracing these evils to their origin every man had found it in the turbulence and follies of democracy: that some check therefore was to be sought for against this tendency of our Governments: and that a good Senate seemed the most likely to answer the purpose." At p. 51.

Mr. King of Massachusetts pointed out that choosing the second branch by state legislatures would be impracticable unless that branch was very numerous or the idea of proportion among the states was to be abandoned. If proportionate representation were followed in the second branch, there would have to be "80 or 100 members to entitle Delaware to the choice of one of them." At pp. 51, 52.

Again, during the debate, Mr. Madison drew an analogy to the system of representation in the State of Virginia, "where large and small counties were often formed into one district." At p. 52.

At this point, Mr. Sherman of Connecticut suggested that one member be elected by each of the State Legislatures, apparently referring to the second branch. No action was taken on this important suggestion. At p. 52.

The Committee rejected by a vote of 7 to 3 the proposal to elect members of the first branch out of nominations by the State Legislatures. At p. 52.

June 6. The Committee of the Whole again rejected a motion by Mr. Pinckey of South Carolina to change the mode of election of the first branch of the legislature from

election by the people to election by the legislatures of the several states. At p. 130, Journal. The debates on this motion reflect the varying opinions respecting the merits of a popular choice of legislatures.

Mr. Gerry of Massachusetts suggested that in England, "the people will probably lose their liberty from the smallness of the proportion having a right of suffrage." But, he aded: "Our danger arises from the opposite extreme * * *." At p. 132.

James Wilson of Pennsylvania urged that governmental authority should "flow immediately from the legitimate source of all authority"—the people. He urged that "the Legislature ought to be the most exact transcript of the whole Society. Representation is made necessary only because it is impossible for the people to act collectively." At pp. 132, 133.

Roger Sherman of Connecticut urged a balance in authority between the national government and state governments, with the rights of the people preserved by electing state legislatures who in turn would have the power to elect representatives to the national government. At p. 133.

Col. Mason of Virginia compared the Confederacy, where Congress represented the states, not the people of the states, with new plans of government where people would be represented directly and should, therefore, choose their representatives. At pp. 133-134.

Mr. Madison's comment during this discussion recognizes the need to temper in some fashion the principle of majority rule so as to protect the rights of the minority. He urged that, "an election of one branch at least of the Legislature by the people immediately" was necessary for better representation of the people as well as to avoid too much control of the national government by state governments. But he recognized that:

> "In all cases where a majority are united by a common interest or passion, the rights of the minority

are in danger. What motives are to restain them?" At pp. 134-135.

Madison observed that the source of oppression in relations between the parent cities of Rome, Athens and Carthage and their respective provinces was that the cities possessed the power and abused their inferiors. He observed further:

> "What has been the source of those unjust laws complained of among ourselves? Has it not been the real or supposed interest of the major number? Debtors have defrauded their creditors. The landed interest has borne hard on the mercantile interest. The Holders of one species of property have thrown a disproportion of taxes on the holders of another species. *The lesson we are to draw from the whole is that where a majority are united by a common sentiment and have an opportunity, the rights of the minor party become insecure.* In a Republican Govt. the Majority if united have always an opportunity. The only remedy is to enlarge the sphere, and therby divide the community into so great a number of interests and parties, that in the 1st. place a majority will not be likely at the same moment to have a common interest separate from that of the whole or of the minority; and in the 2d. place, that in case they should have such an interest, they may not be apt to unite in the pursuit of it. It was incumbent on us then to try this remedy, and with that view to frame a republican system on such a scale and in such a form as will controul all the evils which have been experienced." (Emphasis added). At pp. 135-136.

Mr. Dickinson of Delaware urged that one branch should be chosen by the people and the other branch by the legislatures of the states. He urged:

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"In the formation of the Senate we ought to carry it through such a refining process as will assimilate it as near as may be to the House of Lords in England." At p. 136.

He urged that the Senate should be given independence by election irrevocable for terms of 3, 5 or 7 years.

William Pierce of Georgia urged that the different modes of election of members in the separate branches of the legislature would afford representation of the citizens of various states both "individually" and "collectively". At p. 137.

It appears that at one point that George Read of Delaware suggested that the idea of preserving state governments should be abandoned. At p. 137. Speaking to the general question before the Committee of the Whole, Mr. Butler of South Carolina said that he was against, "determining the mode of election until the ratio of Representation is fixed—if that proceeds on a principle favorable to wealth as well as numbers of Free Inhabitants, I am content to unite with Delaware (Mr. Read) in abolishing the State Legislatures, and becoming one Nation instead of a confederation of Republics." At p. 144, Notes of King.

June 7. The Committee of the Whole considered the method for choosing members of the second branch of the legislature. Various proposals were made, including election (a) by popular vote, (b) by state legislatures, (c) by the first branch of the national legislature, and (d) by the National Executive.

Mr. Gerry of Massachusetts opposed election by the first branch because it would make the second branch dependent upon the first, "contrary to the end proposed." He opposed election by a national executive because it tended toward monarchy. He opposed election by the people because they were divided into two principal interests, the landed interest and the commercial, including stockholders. "To draw

both branches from the people will leave no security to the latter interest; the people being chiefly composed of the landed interest, and erroneously, supposing, that the other interests are adverse to it." Mr. Gerry favored election of the second branch by the state legislatures as a "check in favor of the commercial interests against the landed; without which oppression will take place, and no free Government can last long when that is the case." At p. 152.

Mr. Dickinson of Delaware spoke of the need to preserve state governments in proper balance with the national legislature so that each could serve as a check upon the other. He argued that if all power is drawn from the people at large the national government would simply "unite the 13 small streams into one great current pursuing the same course without any opposition whatever." At p. 153.

Mr. Gerry of Massachusetts drew analogy to, "some States (where) there are two Branches in the Legislature, one of which is somewhat aristocratic." He considered that this would assure "a better chance of refinement in the choice" of representatives. At p. 155. He argued against elections by districts because of impracticability and because, "small States forming part of the same district with a large one, * * * would have no chance of gaining an appointment for its citizens of merit," thus causing discord between different parts of the same district.

The resolution of Mr. Dickinson that the second branch of the national legislature be chosen by the legislatures of the states was adopted unanimously, delegates from New Hampshire and Rhode Island being absent. At p. 149, Journal.

June 8. Mr. Charles Pinckney of South Carolina moved that the legislative entitlement of states be determined by dividing the states into three classes, according to "the comparative importance of each State, at fixed periods",

the first class to elect three members, the second class, two members, and the third class, one member each. The committee adjourned without taking a vote on the resolution.

On this date, however, the conflict of feelings between small and large states was expressed in the debate concerning the clause giving the national legislature "a negative" on such laws of the state as might be contrary to the articles of the union or of treaties with foreign nations. Mr. Madison spoke in favor of this power. Mr. Gunning Bedford, Jr. of Delaware voiced the fears of the small states that "may be injured at pleasure without redress." He urged that the power was meant "to strip the small States of their equal right of suffrage," arguing that Delaware would have a representative share of 1/90th in the "General Councils" while Pennsylvania and Virginia "would possess 1/3 of the whole." He argued:

> "Is there no difference of interests, no rivalship of commerce, of manufacturers? Will not these large States crush the small ones whenever they stand in the way of their ambitions or interested views. This shows the impossibility of adopting such a system as that on the table, or any other founded on a change in the principle of representation * * *. It seems as if Pennsylvania and Virginia by the conduct of their deputies wished to provide a system in which they would have an enormous and monstrous influence." At p. 167.

The Proposal to extend the negative power of the national government over state laws was defeated by a vote of 7 against, 3 in favor and one delegation, Delaware, divided. The three large states, Massachusetts, Pennsylvania and Virginia, voted in favor of this national power. At p. 168.

June 9. At this session of the Committee William Paterson and David Brearly, both of New Jersey, moved to resume the discussion of representation in the National Legis-

lature. Brearly suggested "that a map of the United States be spread out, that all the existing boundaries be erased, and that a new partition of the whole be made into 13 equal parts." At p. 177.

In introducing the discussion on the motion Brearly contended that the problem of representation was properly settled at the time of forming the Confederation by allowing each state an equal vote. "Otherwise the smaller States must have been destroyed instead of being saved." Although he conceded that the "substitution of a ratio * * * carried fairness on the face of it" he contended that "on a deeper examination" it was "unfair and unjust." Brearley also argued that because of the disparity of the states, "by the quota of Congress Virginia would have 16 votes, and Georgia but 1. A like proportion to the others will make the whole number ninety. There will be 3 large states and 10 small ones." He contended that the large states, Massachusetts, Pennsylvania and Virginia, "will carry everything before them." At p. 176-177. Brearly argued further:

> "Virginia with her sixteen votes will be a solid column indeed, a formidable phalanx. While Georgia with her Solitary vote, and the other Little states will be obliged to throw themselves constantly into the scale of some large one, in order to have any weight at all." At. p. 177.

Paterson considered "the proposition for a proportional representation as striking at the existence of the lesser States." At p. 177. He argued further as follows:

> "He said there was no more reason that a great individual State contributing much, should have more votes than a small one contributing little, then that a rich individual citizen should have more votes than an indigent one. If the rateable property of A was to

> that of B as 40 to 1 ought A for that reason to have 40 times as many votes as B. Such a principle would never be admitted, and if it were admitted would put B entirely at the mercy of A. As A has more to be protected than B so he ought to contribute more for the common protection. The same may be said of a large State which has more to be protected than a small one. Give the large States an influence in proportion to their magnitude, and what will be the consequence? Their ambition will be proportionally increased, and the small States will have everything to fear." At p. 178.

Paterson made it clear that New Jersey would never confederate on the plan which was before the Committee. "She would be swallowed up. He had rather submit to a monarch, to a despot, than to such a fate." At p. 179.

James Wilson of Pennsylvania argued the case for proportional representation, contending that "as all authority was derived from the people, equal numbers of people ought to have an equal number of representatives, and different numbers of people different numbers of representatives." He also observed that in districts as large as the States, the number of people was "the best measure of their comparative wealth. Whether therefore wealth or numbers were to form the ratio it would be the same." At p. 179-180. He noted Mr. Paterson's admission that persons, not property, should be the measure of suffrage, and argued:

> "Are not the citizens of Pennsylvania equal to those in New Jersey? does it require 150 of the former to balance 50 of the latter? Representatives of different districts ought clearly to hold the same proportion to each other, as their respective constituents hold to each other." At p. 180.

Hugh Williamson of North Carolina drew an analogy to the composition of state legislatures, comparing the differ-

ent states in the federal union "to Counties of different sizes within the same State: observing that proportional representation was admitted to be just in the latter case, and could not therefore be fairly contested in the former." At p. 180.

Because of the importance of the issue, a decision was postponed.

June 11. At this next meeting of the Committee of the Whole, important decisions were reached. It was at this session that Mr. Sherman of Connecticut proposed the Connecticut Plan which was ignored at this time but which later came to be adopted, specifically that the first branch of the legislature should be composed of members elected according to the respective numbers of free inhabitants and that in the second branch, or Senate, each State should have one vote and no more. At pp. 192-195, 196.

The action taken by the Committee was as follows:

a. That the first branch of the Legislature should be composed not according to the rule established in the Articles of Confederation, but according to some "equitable ratio of representation" carried by a vote of 7 to 3, New York, New Jersey and Delaware voting in the negative, with one delegation, Maryland, divided.

b. James Wilson's motion that the "equitable ratio of representation" in the first branch should be in accordance with the whole number of white citizens and three-fifth of other inhabitants except Indians not paying taxes carried by a vote of 9 to 2, New Jersey and Delaware in the negative.

c. On Sherman's motion that in the second branch of the Legislature each state shall have one vote, the Committee voted six against and five in the affirmative. The three largest states plus North Carolina, South Carolina and Georgia voted in the negative.

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d. The motion of Wilson that the second branch of the Legislature be composed according to the rule established for the first branch was carried by a vote of 6 to 5, the states dividing as on the preceding proposition.

In urging the Connecticut plan, Mr. Sherman argued that states should be in a position to protect themselves, otherwise a few large states would rule the rest. He drew a comparison between the House of Lords in England and the House of Commons. At p. 196.

Benjamin Franklin spoke of the bitterness of the debate on the issue of representation. He favored proportionate representation and rule by the majority of members, not by the majority of states. He spoke of the unwillingness of the larger states to have their property left to the disposition of the smaller and of the fear of the smaller states that their futures would be controlled by the larger states. Referring to the proposition of an "honorable gentlemen" from New Jersey, that of equalizing the states by disregarding borders and beginning anew, he found it impracticable, because it would mean, for example, giving part of Pennsylvania to New Jersey and another part to Delaware. This adjustment, although producing equality at the outset, would require continuous changes and divisions to maintain equal proportions of inhabitants. At p. 199.

Accordingly, Benjamin Franklin proposed an equitable solution as follows:

"Let the weakest State say what proportion of money or force it is able and willing to furnish for the general purposes of the Union.

"Let all the others oblige themselves to furnish each an equal proportion.

"The whole of these joint supplies to be absolutely in the disposition of Congress.

"The Congress in this case to be composed of an equal number of Delegates from each State:

"And their decisions to be by the majority of individual members voting.

"If these joint and equal supplies should on particular occasions not be sufficient, let Congress make requisitions on the richer and more powerful States for farther aids, to be voluntarily afforded, leaving to each State the right of considering the necessity and utility of the aid desired, and of giving more or less as it should be found proper." At pp. 199-200.

In urging that a vote be taken on his motion for one vote per state in the second branch of the Legislature, Mr. Sherman said:

"Everything * * * depended on this. The smaller States would never agree to the plan on any other principle (than an equality of suffrage in this branch * * *) * * *." At p. 201.

June 13. The Committee of the Whole voted to submit the Virginia Plan as amended for consideration by the Convention and the Committee then adjourned. The plan called for a National Legislature of two branches, the members of the first branch to be elected by the people of the several states, those of the second branch to be elected by the individual legislatures; representation in the first branch being according to an equitable ratio in proportion to the whole number of white and other free citizens and inhabitants and 3/5 of all other persons except Indians not paying taxes, and representation in the second branch to be according to the same rule established for the first. The resolutions also provided, "that a republican constitution, and its existing laws, ought to be guaranteed to

each State by the United States," and that the national legislature was empowered to negative all laws passed by the several states contravening the articles of union or any treaties subsisting thereunder. At pp. 224-227, *Journal.*

June 15. The Virginia Plan as reported by the Committee of the Whole was recommitted for further consideration by the Committee along with the New Jersey Plan as offered on this date by William Paterson. This latter proposal constituted the small states' reply to the Virginia Plan. It was based upon the alleged belief that the delegates were not authorized to propose so drastic a revision in the form of government as that embodied in the Virginia Plan, and it provided for a preservation of the basic structure of government under the Articles of Confederation, while substantially augmenting its powers, both external and internal.

The footnote to Madison's notes, probably added some time subsequent to the taking of the notes, shows the hardening of the position taken by the smaller states. According to Madison, Connecticut and New York were against a departure from the basic principles of the Confederation, preferring to strengthen the powers under the Confederation rather than substitute a national government. New Jersey and Delaware were strongly opposed to proportional representation in national government. At least one representative from Maryland shared these views. This opposition began "to produce serious anxiety for the result of the Convention. — Mr. Dickinson said to Mr. Madison *You see the consequences of pushing things too far.*" Some of the members from the small States who desired a National Government simply would not "be thrown under the domination of the large States." At p. 242. (Emphasis added.)

June 16. The debate continued over a choice between the New Jersey Plan merely to strengthen the Articles

of Confederation and the Virginia Plan for a national government with proportional representation in both Houses.

June 18. The Committee of the Whole met to continue consideration of both plans. Alexander Hamilton, whose views differed with those of his fellow delegates from New York who sided with the smaller states, declared that he was opposed to any plan which sought simply to strengthen the Articles of Confederation. Hamilton proposed, instead, a strong national government with a Chief Executive and members of the Senate elected to serve for life, during good behavior. Laws of any state could be voided by laws of the United States and, "the better to prevent such laws" of the states being passed, the Governor or President of each state "shall be appointed by the General Government and shall have a negative upon the laws about to be passed in the State * * *." At pp. 291-293. In the Notes of Yates, at p. 300, Hamilton himself is quoted as saying that some might say he was proposing "an elective monarchy."

June 19. Madison made a vigorous plea to the Committee to work toward an effective National Government. He recognized the problem of representation as the key stumbling block. This issue was whether "it would not be *just to allow Virginia* which was 16 times as large as Delaware an equal vote only" as against the question whether "it would not be *safe for Delaware* to allow Virginia 16 times as many votes." At p. 321. He further noted the prospect of new western states coming into the Union with few inhabitants and that if they were given an equal vote "a more objectionable minority than ever might give law to the whole." At p. 322.

Rufus King of Massachusetts pointed out that states were not "sovereigns" in the sense contended for by some. "They could not make war, nor peace, nor alli-

ances, nor treaties. * * * If the States therefore retained some portion of their sovereignty, they had certainly divested themselves of essential portions of it." At pp. 323-324.

Alexander Martin said "he could never accede to a plan that would introduce an inequality and lay 10 States at the mercy of Virginia, Massachusetts and Pennsylvania." At p. 324.

Following the debate, further consideration of the New Jersey plan was postponed and Randolph's Virginia Plan was to be reported out without further amendment.

June 20. The delegates met in convention and took up the Randolph plan. The debate continued. Again ignored was Sherman's proposal for popular representation in one house and for equal votes by states in the other. At p. 343.

John Lansing, Jr. of New York said that he was "not authorized to accede to a system which will annihilate the state governments, and the Virginia plan is declarative of such extinction." At p. 345, Notes of Yates.

June 21. William Johnson of Connecticut joined in urging the Connecticut Plan as previously proposed by his colleague, Roger Sherman. At p. 363, Notes of Yates.

June 25. The Convention voted on various resolutions, and the debate on representation continued. Nathanial Gorham of Massachusetts "inclined to a compromise as to the rule of proportion. He thought there was some weight in the objections of the small states. If Virginia should have 16 votes and Delaware with several other States together 16 those from Virginia would be more likely to unite than the others, and would therefore have an undue influence. *This remark was applicable not only to States, but to Counties or other districts of the same State.* Accordingly the Constitution of Massachusetts had

provided that the (representatives of the) larger districts should not be in an exact ratio to their numbers. And experience he thought had shown the provision to be expedient." At pp. 404-405. (Emphasis added.)

June 27 to July 11. The debate in the Convention continued as to the form of representation in the Legislature.

Luther Martin of Maryland spoke for the smaller states and urged against a surrender of sovereignty by the states. He repeated the fears that with 42 out of 90 votes, Virginia, Massachusetts and Pennsylvania would win over another state and become the "complete masters of the rest. * * *" At p. 437-438.

According to the Notes of Yates, Martin stressed the concept of a federal union of states rather than a union of peoples who are already governed by state governments. He urged that: "The general government is therefore intended only to protect and guard the rights of the states as states." At p. 453.

Hugh Williamson of North Carolina argued that the smaller states would not be in danger since as "poor States, they would unable to pay in proportion to their numbers", and could combine to lay burdens upon the large states. At p. 446.

Madison argued that the rule urged by the smaller states was not just and not necessary for their safety. Again he drew an analogy to state governments: "Why are Counties of the same States represented in proportion to their numbers? Is it because the representatives are chosen by the people themselves? so will be the representatives in the National Legislature. Is it because the larger have more at stake than the smaller? * * *.

"* * * The true policy of the small States therefore lies in promoting those principles and that form of Government which will most approximate the States to the condition of Counties." At pp. 447-449.

Appendix A

Madison stressed that the National Government would have "a complete power of taxation, the highest prerogative of supremacy * * *." At p. 447. He urged that it was not necessary to secure the small states against the large because the large states would not necessarily have common interests which would impel them to combine against the small states. At p. 447.

Roger Sherman of Connecticut replied saying: "The question is not what rights naturally belong to men; but how they may be most equally and effectively guarded in Society. * * * The rich man who enters into Society along with the poor man, gives up more than the poor man, yet with an equal vote he is equally safe. Were he to have more votes than the poor man in proportion to his superior stake, the rights of the poor man would immediately cease to be secure." At p. 450.

According to the Notes of Yates, Madison, replying to the argument of Mr. Sherman, commented, consistent with the views of the smaller states and inconsistent with his earlier position:

> "In the United Netherlands, Holland governs the whole, although she has only one vote. The counties in Virginia are exceedingly disproportionate*, and yet the smaller has an equal vote with the greater, and no inconvenience arises." At p. 457.

On June 29, John Lansing, Jr. of New York moved to amend the proposal for the composition of the first branch of the legislature by providing that it shall be composed according to the rule established in the Articles of Confederation. At p. 468. This motion was defeated by a

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* Virginia Constitution 1776, Chap. II, § V, VI provided one legislative chamber based on governmental entities alone and the other chamber on a mixture of population and governmental entities.

vote of 6 to 4, with one delegation, Maryland, divided; North Carolina, South Carolina and Georgia voted with the three largest states. This somewhat regressive motion to restore the first branch of the Legislature to one vote per state as in the Confederation indicates the hardening of the position taken by the smaller states. It was becoming apparent at this point in the Convention that the large and small states, as groups, would definitely not yield to each other's proposals.

Also on June 29, William Johnson of Connecticut urged that the states be considered in two capacities, one in their political capacity and the other as districts of individual citizens, with the two ideas combined so that in one branch of the legislature the people would be represented, and, in the other, the states. At pp. 461-462.

In a conciliatory note, Madison expressed agreement with Dr. Johnson, "that the mixed nature of the Government ought to be kept in view; but thought too much stress was laid on the rank of the States as political societies." At p. 463. Madison spoke of comparative degrees of sovereignty, of the "gradation * * * from the smallest corporation, with the most limited powers, to the largest empire with the most perfect sovereignty." At pp. 463-464. He also argued that the states had already surrendered part of their sovereignty in the Confederation and that under the proposed National Government their powers "will be much farther reduced." At p. 464.

Oliver Ellsworth, also of Connecticut, urged that the concept of one vote for each state "would become a ground of compromise with regard to the second branch", and he moved accordingly. He said:

> "We were partly national; partly federal. The proportional representation in the first branch was conformable to the national principle and would secure the large States against the small. An equality of voices

was conformable to the federal principle and was necessary to secure the small States against the large. He trusted that on this middle ground a compromise would take place." At p. 468.

Alexander Hamilton observed on June 29: "• • • *individuals forming political Societies modify their rights differently, with regard to suffrage.* Examples of it are found in all the States." (In this connection, he noted property qualifications for voting, as well as the division of a state into different districts of different size, saying that this caused "no considerable inconvenience in New York") (Emphasis added.) At pp. 465-466.

Hamilton also observed candidly:

"The truth is it is a contest for power, not for liberty." At p. 466.

And he further noted that:

"Strict representation is not observed in any of the state governments. The senate of New York are chosen by persons of certain qualifications, to the exclusion of others." At pp. 472-473, Notes of Yates.

The Notes of Yates quote Madison as urging that the small states need not fear a combination of the large states along lines of common interest but rather: "The great danger to our general government *is the great southern and northern interests of the continent, being opposed to each other. Look to the votes in congress, and most of them stand divided by the geography of the country, not according to the size of the states.*" At p. 476.

On the following day, June 30, Madison repeated this argument saying that the "great division of interests in the United States" was not along lines of the size of states but rather because of (a) climate and (b) "principally

from (the effects of) their having or not having slaves * * *." He argued that the division would not lie between large and small states but: "it lay between the Northern and Southern, and if any defensive power were necessary, it ought to be mutually given to these two interests." At p. 486.

On this same day, James Wilson of Pennsylvania argued that smaller states contend for a rule which would permit 7 of the states to control the remaining 6 although the 7 represented the weight of 24 as to 90 according to population. At p. 482. He urged that the government was being formed for *men*, not "for the imaginary beings called States." At p. 483.

Mr. Ellsworth of Connecticut replied that the minority did not rule the majority as contended by Mr. Wilson but that "the power is given to the few to save them from being destroyed by the many." He noted that he did not contend for an equal number of votes for all states in both branches of the legislature. He stressed that it was not "novel" that "the few should have a check on the many," referring to the House of Lords, the representatives of a small proportion of a nation, as serving as a check on the Commons. At p. 484.

Here Mr. Madison replied to Mr. Ellsworth saying:

> "It was urged, he said, continually that an equality of votes in the second branch was not only necessary to secure the small, but would be perfectly safe to the large ones whose majority in the first branch was an effectual bulwark. But notwithstanding this apparent defence, the Majority of States might still injure the majority of people. 1. they could *obstruct* the wishes and interests of the majority. 2. they could *extort* measures, repugnant to the wishes and interest of the majority. 3. they could *impose* measures adverse thereto; as the second branch will probably ex-

> ercise some great powers, in which the first will not participate." At p. 486.

Madison "admitted that every peculiar interest whether in any class of citizens, or any description of States, ought to be secured as far as possible." But it is here that he contended that the differences in States were not in terms of size but in terms of climate and slavery. At p. 486.

William Davie of North Carolina argued that establishing proportional representation in the Senate would be impracticable because it would require 90 members at the outset and additional members as new states were added. This would produce too large a body for the qualities it should possess. At p. 487. Mr. Davie suggested "that in general there were extremes on both sides. We were partly federal, partly national in our Union." At p. 488.

Mr. Wilson conceded that a small senate was preferable, but continued to urge proportionate representation according to the number of inhabitants in each state. At p. 488.

Benjamin Franklin summarized the diversity of opinion as follows:

> "* * * If a proportional representation takes place, the small States contend that their liberties will be in danger. If an equality of votes is to be put in its place, the large States say their money will be in danger. When a broad table is to be made, and the edges (of planks do not fit) the artist takes a little from both, and makes a good joint. In like manner here both sides must part with some of their demands, in order that they may join in some accommodating proposition. * * *" At p. 488.

Benjamin Franklin then proposed a compromise so as to give each state equal voting power in the election of national officers and on all questions wherein its sovereignty could be affected or its authority over its own citizens di-

minished. At p. 489. This proposal did not gain any support. However, it represents one of the points in the debate at which an effort is made to recognize the demands of the smaller states and to achieve some measure of compromise.

Mr. Bedford spoke of the ambition and avarice of political societies, and that this should be recognized in the formation of a government. He referred to Great Britain and to the inequality of representation in its government. He also referred to the boroughs which have "held fast their constitutional rights." He asked, "are we to act with greater purity than the rest of mankind?" At p. 491.

Mr. Bedford stated further:

> "An exact proportion in the Representation is not preserved in any one of the States." At p. 491.

Mr. Bedford expressed his fears that the three large states had a common interest to bind themselves together in commerce and asserted that whether this or other combinations occurred, in either case the smaller states would be ruined. At p. 491. The debate of June 30th closed with remarks by Rufus King of Massachusetts who said he did not think "a full answer had been given to those who apprehended a dangerous encroachment on their jurisdictions." He urged that "Expedients might be devised as * * * would give them all the security the nature of things would admit of." He admitted the propriety of securing the rights of states in the National Constitution. At pp. 492-493.

At the outset of the Convention session on Monday, July 2, a motion was made to pass the resolution providing for one vote for each state in the second branch of the legislature. The motion was defeated on a 5 to 5 vote, one state divided. (New Hampshire and Rhode Island were not voting and not represented.) On this vote, Massachusetts, Pennsylvania, Virginia, North Carolina and South Caro-

lina were in the negative. Connecticut, New York, Delaware, New Jersey and Maryland were in the affirmative and Georgia was the divided delegation. At pp. 509-510.

It was then decided to refer this matter to a Grand Committee composed of one member from each state. Most of the delegates favored this proposal. It was clear that very few, if any, were willing to allow the convention to founder and that a compromise was desired.

During the discussion on the question to commit, Gouverneur Morris, of New York, who had recently returned to the Convention after a long absence, theorized that the two houses of the legislature should be not only independent of each other but should really be adverse. As such, since the first branch was to be constituted according to popular representation, the second should consist of representatives of the wealthy class to serve for life. He noted that the wealthy people had a very substantial interest which deserved protection and that they should at least be given a place in the government by virtue of their position. At pp. 511-514.

The Grand Committee met on Tuesday, July 3, and appears to have completed its business on that one day. Yates' notes of the Committee's deliberations are as follows (at pp. 522-523):

> "The *grand committee* met. Mr. Gerry was chosen chairman.
>
> "The committee proceeded to consider in what manner they should discharge the business with which they were entrusted. By the proceedings of the convention they were so equally divided on the important question of *representation in the two branches*, that the idea of conciliatory adjustment must have been in contemplation of the house in the appointment of this committee. But still how to effect this salutory purpose was the question. Many of the members, impressed with the

utility of a general government, connected with it the indispensable necessity of a representation from the states *according to their numbers and wealth;* while others, equally tenacious of the rights of the states, would admit of no other representation but such *as was strictly federal,* or in other words, *equality of suffrage.* This brought a discussion of the principles on which the house had divided, and a lengthy recapitulation of the arguments advanced in the house in support of these opposite propositions. * * *"

"These remarks gave rise to a motion of Dr. Franklin, which after some modification was agreed to, and made the basis of the following report of the committee.

"The committee to whom was referred the eighth resolution, reported from the committee of the whole house, and so much of the seventh as had not been decided on, submit the following report:

"That the subsequent propositions be recommended to the convention, on condition that both shall be generally adopted.

"That in the first branch of the legislature, each of the states now in the union, be allowed one member for every 40,000 inhabitants, of the description reported in the seventh resolution of the committee of the whole house— That each state, not containing that number, shall be allowed one member.

"That all bills for raising or apportioning money, and for fixing salaries of the officers of government of the United States, shall originate in the first branch of the legislature, and shall not be altered or amended by the second branch; and that no money shall be drawn from the public treasury, but in pursuance of appropriations to be originated in the first branch.

Appendix A

"That in the second branch of the legislature, *each state shall have an equal vote.*" At pp. 522-523.

It is apparent from the recommendations of this committee that the large and wealthier states were most worried about subjecting their wealth to the control of the smaller states. Apparently it satisfied at least the members of the Grand Committee and eventually the whole Convention that if fiscal bills were to originate in the popular branch the major interest of the larger states would be sufficiently protected, even though the prohibition against amendment by the Senate was later deleted.

When the convention met two days later on July 5, 1787, Mr. Gerry delivered the report on behalf of the Committee. Explaining the report, Mr. Gerry, according to the notes of Madison, at p. 527, said:

> "The committee were of different opinions as well as the Deputations from which the Committee were taken, and agreed to the Report merely in order that some ground of accommodation might be proposed. Those opposed to the equality of votes have only assented conditionally; and if the other side do not generally agree will not be under any obligation to support the Report."

Substantial opposition to the report was lodged. According to his own notes (p. 527), "Mr. [Madison] could not regard the exclusive privilege of originating money bills as any concession on the side of the small states. * * *"

On July 7 the second proposition of the Grand Committee was discussed, namely, the recommendation that each state be given one vote in the second branch of the legislature. Elbridge Gerry of Massachusetts urged that this was the "critical question. He had rather agree to it than have no accommodation." At p. 550.

James Wilson of Pennsylvania still spoke against the proposal but the convention approved the words of the report by a vote of 6 to 3, with two delegations divided. Pennsylvania, Virginia and South Carolina voted against and Massachusetts and Georgia were divided. At pp. 550-551.

Gouverneur Morris of Pennsylvania argued against adoption of the proposal, urging that "it made another Congress, a mere whisp of straw," and that now there was no "check in the Senate." At pp. 551-552.

On July 9 the Convention met to hear the report of a committee of 5 members to whom the responsibility was given for drawing up a plan for the precise representation in the first house of the legislature. At p. 559. Nathaniel Gorham of Massachusetts objected to the ratio of one member for every 40,000 inhabitants. He said that this would produce too numerous a house and, secondly, that the western states might ultimately outvote the states bordering the Atlantic. He suggested that the Atlantic states, who have the government in their own hands, should deal out the right representation in safe proportions to the western states. At pp. 559-560. Mr. Williamson of North Carolina thought that the rule of numbers was acceptable, but that western states stood on a different footing and unless their property was rated as high as the property in the Atlantic states they should not have like representation. At p. 560.

Also of interest is the fact that Georgia was to be given two members on the theory that her population was rapidly increasing and would soon enfitle her to two representatives. William Paterson of New Jersey objected to an estimate based upon the combined rule of numbers and wealth (including slaves). He said that the standards were vague and that the three-fifths ratio for counting negroes indirectly encouraged the slave trade. At p. 561.

Appendix A

On July 10, the Grand Committee reported out a plan for the apportionment of members in the first branch of the legislature, to consist of 65 members. At p. 566. Numerous objections were raised to the allocation of representatives.

July 16. On Monday, July 16, the Convention finally adopted the report of the Grand Committee, including the provision that the second branch of the Legislature be constituted so that each state have an equal vote. The motion was adopted on a 5 to 4 vote, with one state divided. Pennsylvania, Virginia, South Carolina and Georgia were in the negative, with Massachusetts divided.

At this point, Governor Randolph proposed that the Convention adjourn until the following day so that the delegates from the larger states could consider the vital proposition that had just been voted upon. (Emphasis added): II Farrand at 15-19.

Madison's notes show that on the following morning, before the Convention reconvened, delegates from the larger states, and some from the smaller, met in conference to consider their position. It was apparent that delegates from the larger states could not agree among themselves uniformly to oppose the composition of the second branch of the legislature. Some delegates found it acceptable, others considered it more desirable than to have the Convention fail, and some were resolutely opposed. Id. at 19-20.

July 23. The composition of the second branch of the legislature was not discussed again until July 23, at which time *the Convention voted 10-0 to adopt the proposal that each state should elect two members to the second branch of the legislature.* (Emphasis added). Id. at 85-86. The majority of delegates from New York were

no longer present at the Convention, having left in protest on July 5, before the Convention had approved the proposal of the smaller states for the second branch of the legislature. I Farrand at 536.

The Convention went on to consider other provisions concerning the legislature, but the basic structure of the plan of representation had been established. Ultimately, Governor Randolph and George Mason of Virginia and Elbridge Gerry, of Massachusetts, declined to sign the Constitution as finally promulgated by the Convention. Their failure to do so was based on various grounds, including their objection to the composition of the legislature as finally adopted.